Supreme Court, U.S.
FILED
MAY 29 1991
OFFICE OF THE CLERK

No. 90-6861 (5)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

JOHN J. MCCARTHY,
Petitioner,

v.

MR. MADDIGAN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

JOINT APPENDIX

PAUL M. SMITH *
ALAN E. UNTEREINER
ONEK, KLEIN & FARR
Washington, DC 20037
(202) 775-0184
Counsel for Petitioner

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, DC 20530
(202) 514-2217
Counsel for Respondents

* Counsel of Record

PETITION FOR CERTIORARI FILED JANUARY 18, 1991
CERTIORARI GRANTED APRIL 22, 1991

22pp

TABLE OF CONTENTS

	Page
Docket Entries	1
Complaint (April 3, 1990)	2
Order of the United States District Court for the District of Kansas Dismissing Action Without Prejudice (April 6, 1990)	12
Order of the United States District Court for the District of Kansas Denying Motion for Relief from Judgment (April 19, 1990)	14
Opinion of the United States Court of Appeals for the Tenth Circuit (September 20, 1990)	16
Order of the Supreme Court of the United States granting certiorari and leave to proceed in forma pauperis, April 22, 1991	20

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
April 3, 1990	—Complaint filed
April 6, 1990	—Order dismissing action without prejudice filed
April 16, 1990	—Motion for Relief from Judgment filed
April 19, 1990	—Order denying Motion for Relief from Judgment filed
September 20, 1990	—Opinion of the United States Court of Appeals for the Tenth Circuit filed

JOHN J. MCCARTHY #38051-066 *pro se*
State No; 14163
United States Penitentiary
P.O. Box 1000
Leavenworth, Kansas., 66048

[Name, prison registration
number and place of
confinement]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil Case No. 90-3101-R

JOHN J. MCCARTHY #38051-066
State No; 14163

Plaintiff

versus

Mr Maddigan Hospital Administrator
Dr Perry Chief Psycholigest
Dr Walters Psycholigest
Dr Delmuro, individually and in their
official capacities,

Defendants

COMPLAINT FOR DAMAGES BY FEDERAL PRISONER PURSUANT TO 28 U.S.C. 1331

[Filed Apr. 3, 1990]

I. *Previous Law Suits*

A. Have you begun other lawsuits in state or federal court dealing with the same facts involved in this action or otherwise relating to your imprisonment? Yes [x] No [ ]

B. If your answer to A is yes, describe the lawsuit in the space below. [If there are more than one lawsuit, describe the additional lawsuit on a separate page using the same outline.]

1. Parties to this previous lawsuit

   Plaintiffs _____

   Defendants _____

2. Court [if federal court, name the district; if state court, name the county]

3. Docket Number _____

4. Name of judge to whom case was assigned _____

5. Disposition [for example, was the case dismissed? Was it appealed? Is it still pending?] _____

6. Approximate date of filing lawsuit _____

7. Approximate date of disposition _____

II. *Place of Present Confinement*

United States Penitentiary Leavenworth

A. Is there a prisoner grievance procedure in this institution?

Yes [x] No [ ]

B. Did you present the facts relating to your complaint in any administrative remedy request, parole appeal, or other procedure available at your institution? Yes [x] No [ ]

C. If your answer is YES,

1. What steps did you take? Filed pursuant to 28 C.F.R. Part 542 *et seq*

2. What was the result? Denied

D. If your answer is NO, explain why or explain why exhaustion of administrative remedies is not necessary in your case . .

E. If there is no prison grievance procedure or applicable parole appeal available at your institution, did you complain to prison or parole authorities? Yes [x] No [ ]

F. If your answer is YES,

1. What steps did you take? I discussed the problem with each named defendant.

2. What was the result? Denied/Egnored

III. *Parties*

[In item A below, place your name in the first blank and place your current address in the second blank]

A. Name of plaintiff John J. McCarthy #38051-066 (state No; 14163)

Address P.O. BOX 1000 Leavenworth, KS., 66048

[In item B below, place the full name of the defendant in the first blank, his official position in the second blank, and his place of employment in the third bank. Use item C for the names, positions and places of employment of any additional defendants.]

B. Defendant Mr Maddigan is employed as Leavworth Hospital Administrator at United States Penitentiary

C. Additional defendants Dr Perry/Dr Walters/ Dr Delmuro

IV. *Statement of Claim(s)*

[State here as briefly as possible the *facts* of your case. Describe how each defendant is involved.

Include also the names of other persons involved, dates, and places. Do not give any legal arguments or cite any cases or statutes. If you intend to allege a number of related claims, number and set forth each claim in a separate paragraph. Use as much space as you need. Attach extra sheet if necessary.]

I am a State Prisoner held in Federal Custody pursuant to 18 U.S.C. 5003 I have a history for psychatriciat problems and medical problems because a few months ago I had a opperation on my spine at springfield. I am always in pain because of the opperation and I am being denied Pain medication/singel cell/psychtrist help and medication. On March 28/1990 I appealed to Dr Delmuro for medication and a singel cell because I am in pain and up all night and this causes problems with my cellmate. Dr Delmuro egnored me. I then went and complained to the Hospital Administrator Mr. Maddigan pursuant to the above and he claimed that he is not a doctor and therefor cannot help he also he said that I have nothing comming regardless of my previous conditions. I then went and say Dr Perry Chief Psycholigest and complained that Dr Walters on several occausions denied to me any treatment pursuant to my mental problems of stress and other things. They claimed regardless of my past history I will not be treated for anything and that its to bad. I have been medically unassigned ever since I entered the penitentiary I cannt work because of my medical condition and also I am in pain all the time. The action above constitutes deliberate indeference.

V. *Relief*

[State briefly exactly what you want the court to do for you. If you are seeking monetary damages

against some but not all defendants, identify which defendant(s) you desire to make liable for such damages. Also state whether you desire a jury trial on all issues triable by jury. Make no legal arguments in this space. Cite on cases or statutes.]

This case is for money damages only therefore I do not have to exhaust administrative apprals. Grant a Jury Trial and $100.000.00¢ in Compensatpry/punitive/actual damages against each defendant individually and seperately.

Signed this 28 day of March, 1990.

/s/ John J. McCarthy
[Signature of plaintiff]

I declare under penalty of perjury that the foregoing is true and correct.

/s/ John J. McCarthy
[Signature of plaintiff]

March 28, 1990
[Date]

UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

Civil No. _____

JOHN J. MCCARTHY, #38051-066
State No. 14163

[*Plaintiff*]

v.

HOSPITAL ADMINISTRATOR MADDIGAN
CHIEF PSYCHOLOGIST DR. PERRY
DR. WALTERS
DR. DELMURO
UNITED STATES PENITENTIARY
LEAVENWORTH, KANSAS, 66048-1000

[*Defendant's.*]

Civil Rights Complaint 28 U.S.C. 1331

"With a Jury Demand"

This Complaint seeks Money Damages Only.

COMPLAINT

1. *JURDISCITION;*
   1. 28 U.S.C. 1331
   2. 18 U.S.C. 4042
   3. 18 U.S.C. 5003

2. *PARTIES;*

a. *Plaintiff;*

John J. McCarthy #38051-066 (state No; 14163) is a State of Connecticut prisoner held in Federal Custody pursuant to 18 U. S. C. 5003., and Conn. Gen. Statute 18-91. He is above the age of eighteen years and a tax payer, he is serving sentences for non-violent crimes of Larceny in the first degree cited as *State v. McCarthy*, 197 CONN 257 (1985)., *State v. McCarthy*, 197 CONN 166 (1985).

b. Defendant's;

Maddigan/Perry/Walters/Delmuro are all staff at the United States Penitentiary Leavenworth and work under color of United States Law pursuant to Statutes/ Regulations/Contracts and Agreements. They are above the age of eighteen years and tax payers. Each are sued in boath capacities-officially as well as individually.

3. *THIS COMPLAINT IS EXEMPT TO THE ADMINISTRATIVE APPEALS EXHAUSTION DOCTRINE*

This Complaint seeks "Money Damage Awards Only" therefor is exempt to the administrative appeals exhaustion doctrine. (see; 28 C.F.R. Part 542 *et seq*)[1]

4. *FACTS;*

1. The plaintiff is a State prisoner held in Federal Custody pursuant to 18 U.S.C. 5003., Conn. Gen. Statute 18-91 and a "written contract agreement" pursuant to 18 U.S.C. 5003 (a). The Federal Bureau of prisons has a Statutory duty to provide "medical" treetment to the plaintiff pursuant to 18 U.S.C. 5003 (c) and 4042 (2) *Id.*

[1] Presently the Plaintiff is appealing.

2. The Plaintiff has a long history for serious medical needs. A few months ago he experienced a opperation on his spinal collum at the United States Medical Center at Springfield Missouri. The opperation was unsuccessfull and the plaintiff is in pain most of the time. The Plaintiff also has a history for psychatric care and on several occausions while held in other Federal Penitentiaries was treated with medications because he is unable to cope with stress.

3. For several months the Plaintiff on occasion cpmplained to medical staff about his Back pain and requested medication. The only medication that was ever prescribed was *insignificant* and at times the Plaintiff was forced to purchase contraband drugs. Also the Plaintiff complained to medical staff that because of his back injury and pain problems he is persistently staying up at all hours of the night, he has to lay on the floor and pull on his legs this causes his cellmate to kept up and causes problems between them. The Plaintiff requested a singel cell and staff persistently egnored him.

4. On March 28/1990 the Plaintiff appealed personally to Dr Delmuro for pain medication/a singel cell/ stress medication. Dr Delmuro flagerently egnored the plaintiff and told him that if he was not satisfied to see the hospital administrator Defendant Maddigan. The plaintiff then went and saw Defendant Maddigan and explained his situation to him. Defendant Maddigan claimed that he was not a doctor and therefor could not treat the plaintif and that if he did not like his response to complain to the Warden.[2]

The Plaintiff then went and saw Chief psycholigest Defendant Perry and explained to his that for over a month now he was having these problems and that he had previously scene Defendant Dr Walters complaining of these problems and other problems and that Dr Walters was

[2] The Plaintiff has written the Warden who fails to respond

not going to request a medication untill after the plaintiff seen Dr Delmuro or other hospital staff. The plaintiff informed Dr Perry that he had seen hospital staff and they refused to treat him and that this and related problems were causing stress and violent reactions.

The Plaintiff then went and saw Dr Walters and appealed to him again and Dr Walters claimed that he would not treat the plaintiff.

The Plaintiff then returned and saw Dr Perry explaining the above and Dr Perry attempted to make a joke of the hole situation and laughed.

5. *CONCLUSION AND CONSTITUTIONAL VIOLATIONS;*

1. The action outlined in *FACTS* violates the United States Constitution eighth amendment and is in fact deliberate indefference to serious medical needs.

2. The action outlined *Id.*, violates 18 U.S.C. 5003 the "written contract agreement" and 18 U.S.C. 4042 (2) as well as 28 C.F.R. Regulations 0.95 and 0.96.

3. The action of the Defendant's denying to the plaintiff medication for pain and stress causes plain and suffering and violates the Eighth Amendment of the United States Constitution.

6. *RELIEF;*

Plaintiff seeks "Money Damage Awards Only" in the following ammounts and manner;

1. $100.000.00¢ Compensatory

2. $100.000.00¢ Punitive

3. $100.000.00¢ Actual

4. All Costs for this litigation to be taxed to the Defendant's.

5. All damage awards to apply separately and appear to each and every defendant appart.

6. A Jury Trial on all issues.

7. *VARIFICATION;*

I swear and state under penalty of purjury and the law that the forgoing is true and correct; Executed on 28 day 3 month, 1990 By The Plaintiff;

/s/ John J. McCarthy

John J. McCarthy #38051-066 (state No; 14163)

I swear and state the forgoing to be true and correct; Executed; day 28 month 3 1990 By The Plaintiff;

/s/ John J. McCarthy

John J. McCarthy #38051-066 (state no; 14163)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 90-3101-R

JOHN J. MCCARTHY,
Plaintiff,

v.

MR. MADDIGAN, *et al.*,
Defendants.

ORDER

This matter is before the court on a civil rights complaint filed pursuant to 28 U.S.C. § 1331. Plaintiff, a Connecticut prisoner housed at the United States Penitentiary, Leavenworth, Kansas, (USPL), alleges that defendants have demonstrated deliberate indifference to his medical needs in violation of the Eighth Amendment. Plaintiff seeks damages.

The court finds that plaintiff has failed to demonstrate his use of the administrative remedy process provided by the Bureau of Prisons. Use of the administrative remedy process is a prerequisite to federal judicial review. *See Lane v. Hansberry*, 593 F.2d 648 (5th Cir. 1979); *Brice v. Day*, 609 F.2d 664 (10th Cir. 1979), *cert. denied*, 444 U.S. 1086 (1980); *Rivera v. Toft*, 477 F.2d 535 (10th Cir. 1973). Further, the administrative remedy process is necessary for the proper and effective handing of prisoner complaints and serves as a form of discovery in an attempt to resolve the grievance. *Brice*, 604 F.2d at 667.

IT IS THEREFORE ORDERED that this action is hereby dismissed without prejudice. The clerk of the

court is directed to transmit a copy of this order to plaintiff.

DATED: This 6th day of April, 1990 at Topeka, Kansas.

/s/ Dale E. Saffels
RICHARD D. ROGERS
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

(Title Omitted in Printing)

ORDER

This matter is before the court on plaintiff's motion for relief from judgment pursuant to Fed. R. Civ. Pro. 60(b) and plaintiff's Notice of Appeal, filed simultaneously with this court.

Plaintiff was permitted to proceed in this action in forma pauperis. The action was dismissed without prejudice by this court's Order dated April 6, 1990. Plaintiff has filed a Notice of Appeal from the order of dismissal, and, pursuant to Rule 24(a) of the Federal Rules of Appellate Procedure, might appeal in forma pauperis without further authorization in the absence of a certificate prescribed by the second paragraph of that rule.

The court first finds the motion for relief from judgment should be denied. The court dismissed this action without prejudice due to plaintiff's failure to exhaust available administrative remedies. Plaintiff had provided no new evidence, and the arguments made by plaintiffs do not persuade the court that its prior ruling should be disturbed.

For the reasons set forth in the Order of April 6, 1990, and because plaintiff makes no allegations on appeal, the court further finds that the appeal is legally frivolous and is not taken in good faith.

IT IS THEREFORE ORDERED that plaintiff's motion for relief from judgment be denied.

IT IS FURTHER ORDERED that plaintiff is hereby denied leave to proceed in forma pauperis on appeal. The clerk of the court is directed to transmit a copy of this order to plaintiff and

DATED: This 19th day of April, 1990, at Topeka, Kansas.

/s/ Richard D. Rogers
RICHARD D. ROGERS
United States District Judge

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 90-3112

JOHN J. MCCARTHY,
Plaintiff-Appellant,

v.

MR. MADDIGAN, DR. PERRY; DR. WALTERS, DR. DELMURO,
Defendants-Appellees.

Sept. 20, 1990

Before McKAY, MOORE, and BRORBY, Circuit Judges.

BRORBY, Circuit Judge.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed.R.App.P. 34(a)(1); 10th Cir.R. 34.1.9. The cause is therefore ordered submitted without oral argument.

Appellant John J. McCarthy appeals the district court's dismissal of his civil rights claim filed pursuant to 28 U.S.C. § 1331 and the court's denial of his motion for relief from judgment made pursuant to Fed.R.Civ.P. 60(b). Appellant alleges that the deliberate indifference to his serious medical needs of officials of the federal penitentiary in Leavenworth, Kansas, violates his Eighth

Amendment rights, and he seeks damages. The district court dismissed the claim without prejudice because Mr. McCarthy failed to demonstrate he had made use of the administrative review process provided by the Bureau of Prisons, as required by *Brice v. Day*, 604 F.2d 664, 666-68 (10th Cir.1979), *cert. denied*, 444 U.S. 1086, 100 S.Ct. 1045, 62 L.Ed.2d 772 (1980). District Court Order of April 6, 1990. For the reasons cited in its first order, and because appellant failed to present any new evidence, the district court also denied appellant's motion for relief from judgment. District Court Order of April 19, 1990.

Appellant argues that the law in this circuit is unsettled as to whether exhaustion of administrative remedies is required in a *Bivens*-type action, *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), where a federal prisoner seeks only money damages to redress an alleged constitutional violation. He urges us to follow certain cases from the Third and Sixth Circuits rejecting such a requirement.

The appellants in *Brice v. Day*, argued, as does Mr. McCarthy, that the exhaustion of administrative remedies requirement does not apply where damages are sought for a violation of a constitutional right. 604 F.2d at 665. One of the appellants in *Brice* sought monetary damages and "what other relief the court deems fair." *Id.* This court held that "preliminary fact-finding would be necessary to determine whether there is a possible *Bivens* cause of action. . . . Thus, if we assume that the petitions before us could indicate a *Bivens* cause of action as the appellants argue, we must . . . require an initial administrative inquiry." *Id.* at 666. *Brice* made clear that "this administrative consideration is not to resolve constitutional issues nor to consider damages," *id.* at 667, but simply to develop a factual record to assist the district court in its review.

Appellant relies principally on *Muhammad v. Carlson*, 739 F.2d 122 (3d Cir.1984), and *Goar v. Civiletti*, 688

F.2d 27 (6th Cir.1982), both of which hold that a federal prisoner seeking only money damages in a *Bivens*-type action need not first exhaust administrative remedies. *Muhammad* and *Goar*, however, do not state the law in this circuit. Moreover, these cases mischaracterize this circuit's holding in *Brice*. According to the Third Circuit, *Brice* held that a "federal prisoner seeking damages and other relief for overcrowded conditions must exhaust administrative remedies." 739 F.2d at 125 n. 1; *cf.* 688 F.2d at 29. The rule of *Brice*, however, is not keyed to the type of relief sought, but to the need for preliminary fact-finding. *Brice* does not except cases involving claims for monetary damages only.

We also disagree with the Third Circuit's assumption that the courts "may not take it upon ourselves to impose a judicially-created exhaustion requirement directed at federal prisoners." 739 at 125. Given that *Bivens* actions are "a creation of the judiciary," *id.* at 124; *accord Brice*, 604 F.2d at 665, it follows that the courts may, and indeed must, establish reasonable requirements for bringing such actions. Furthermore, as the Sixth Circuit recognized in *Goar*, "[a]lthough the administrative apparatus could not award money damages . . . , administrative consideration of the possibility of corrective action and a record would have aided a court in measuring liability and determining the *extent* of the damages." 688 F.2d at 29 (emphasis in original).

We further note that in *Hessbrook v. Lennon*, 777 F.2d 999, 1007 n. 14 (1985), the Fifth Circuit correctly construed our holding in *Brice* and declined to adopt the Third and Sixth Circuits' view on this issue. We agree with the *Hessbrook* panel that "a broad exhaustion requirement is particularly appropriate in cases involving federal prisoner complaints against prison officials relating to their . . . treatment during confinement." 777 F.2d at 1007.

We find no merit in the other cases cited by appellant, Appellant's Opening Brief at 3, nor do they alter our conclusion that preliminary fact-finding is necessary in this case, as it was in *Brice*, to determine whether appellant has a possible *Bivens* cause of action. *See* 604 F.2d at 666; *cf. Hatcher v. Office of Comptroller of Currency*, 631 F.2d 985, 989 n. 6 (D.C.Cir.1980) (citing *Brice*). Furthermore, although appellant alleged in his complaint that he had invoked the prison grievance procedure prior to filing this suit, he does not challenge on appeal the district court's finding that he "failed to demonstrate his use of the [available] administrative remedy process." Order of April 6, 1990, at 1.

Accordingly, we grant permission to proceed in forma pauperis, and the order of the district court is AFFIRMED.

SUPREME COURT OF THE UNITED STATES

No. 90-6861

JOHN J. MCCARTHY,
Petitioner

v.

MR. MADDIGAN, *et al.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
U.S. COURT OF APPEALS
TENTH CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

April 22, 1991